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No. _____

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In The

Supreme Court of the United States

October Term, 1988

JOHN M. BOEHM, TAX COMMISSIONER OF THE STATE OF NEBRASKA,

Petitioner,

v.

TRAILER TRAIN COMPANY, RAILBOX COMPANY, AND RAILGON COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Does the tax imposed on the property of car companies pursuant to Neb.Rev.Stat. §§77-624 to 77-633 (Reissue 1986) violate §306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976 (49 U.S.C. §11503(b)(4)) when, under Nebraska law, various types of personal property (including business inventory, crops, livestock, and agricultural machinery and equipment) are exempt from property tax?

LIST OF PARTIES

All respondents (Trailer Train Company, Railbox Company, and Railgon Company) are listed in the caption of the opinion of the United States Court of Appeals for the Eighth Circuit of December 19, 1988, contained at Appendix B. (A20). Donald S. Leuenberger, named as a party in his official capacity as Tax Commissioner of the State of Nebraska in the court below (A20), has been succeeded in office by John M. Boehm. Pursuant to Rule 43(c) of the Federal Rules of Appellate Procedure and Rule 40.3 of the Rules of the Supreme Court of the United States, John M. Boehm has been substituted as the party petitioner seeking a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit.

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OPINIONS BELOW

The Memorandum Opinion following Oral Argument and Judgment of the United States District Court for the District of Nebraska (hereinafter the "District Court"), entered on December 11, 1987, is included as Appendix A. (A1-19). The opinion of the District Court is not reported. The opinion and judgment of the United States Court of Appeals for the Eighth Circuit (hereinafter the "Court of Appeals"), entered on December 19, 1988, is included as Appendix B. (A20-27). The opinion of the Court of Appeals is not yet reported.

JURISDICTION

The opinion of the Court of Appeals was filed on December 19, 1988. (A20). The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS AND STATUTES

The text of Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 is set forth in Appendix C. (A28-30). The provisions of Article VIII, Sections 1 and 2, of the Constitution of Nebraska, are set forth in Appendix D. (A31-33). The text of Neb.Rev.Stat. §§77-201 and 77-202 (Reissue 1986 and Cum.Supp. 1988) are set forth in Appendix E. (A34-36).

STATEMENT OF THE CASE

A. Nature of the Case.

This action arose as a result of the filing of a complaint seeking declaratory and injunctive relief by respondents Trailer Train Co., and its wholly owned subsidiaries, Railbox Co. and Railgon Co. (hereinafter referred to collectively as "Trailer Train"), asserting that the levy and collection of Nebraska's *ad valorem* tax on their tangible personal property violated §306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976 ("the 4-R Act"), Pub.L. 94-210, 90 Stat. 31, 54 (*codified at* 49 U.S.C. §11503). In Trailer Train's complaint, jurisdiction was invoked under 49 U.S.C. §11503(c), 28 U.S.C. §1337, and 28 U.S.C. §1331. The Complaint for Injunctive and Declaratory Relief set forth three causes of action against Donald S. Leuenberger, Tax Commissioner of the State of Nebraska. The first cause of action generally alleged the taxation of Trailer Train's personal property, when, under Nebraska law, various other types of personal property are exempt from taxation, violated §306(1)(d) of the 4-R Act. Trailer Train sought relief barring the imposition of any tax on their property under its first cause of action.

By Order dated September 9, 1987, the district court approved bifurcating the trial of the case to permit the issue raised in the first cause of action to be tried separately from the issues raised in the second and third causes of action. The parties entered into a Stipulation of Facts to be used for the purpose of resolving the issue raised in the first cause of action. Following oral arguments presented to the district court, the court entered a

Memorandum Opinion and Judgment on December 11, 1987, granting Trailer Train's request for declaratory and injunctive relief, ordering that the assessment of Trailer Train's personal property and the imposition, levy or collection of any taxes against Trailer Train pursuant to Neb.Rev.Stat. §77-624 *et seq.* violated §306(1)(d), and permanently enjoining the imposition, levy, and collection of such taxes from Trailer Train. (A1-19).

B. Statement of Facts.

Trailer Train is in the business of furnishing rail cars to railroad common carriers, thereby enabling railroads to obtain and use standardized types of rolling stock. (A21). Trailer Train has no property permanently located in the State of Nebraska; its sole relationship with the state arises by reason of the location of, or operation of, their rail cars in the state by railroads. Trailer Train has no offices or facilities in Nebraska. (A21).

Article VIII, Section 1 of the Constitution of the State of Nebraska provides, in part:

> The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct. Taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises, . . . (A31).

Article VIII, Section 2, of the Nebraska Constitution provides that, with regard to the taxation of personal property, "The Legislature may classify personal property in such manner as it sees fit, and may exempt any of such classes, or may exempt all personal property from taxation." (A33).

Neb.Rev.Stat. §77-201 (Reissue 1986) provides that "all tangible property and real property in this state, not expressly exempt therefrom, shall be subject to taxation and shall be valued at its actual value." (A34). The Nebraska Legislature, exercising the sovereign authority granted under Article VIII, Section 2, has exempted certain types of personal property from taxation. These types of property, which are totally exempt from taxation, include: Agricultural income-producing machinery and equipment; business inventory; feed, fertilizer, and farm inventory; and grain, seed, livestock, poultry, fish, honeybees and fur-bearing animals. Neb.Rev.Stat. §77-202(6), (7), (8), and (9) (Cum.Supp. 1988). (A34-36).

Apart from the statutory exemptions provided for the specific types of personal property identified in §77-202, all types of personal property consisting of business equipment owned by individuals or corporations engaged in business and used in the production of income are subject to *ad valorem* taxation in Nebraska. Non-exempt personal property of this nature is either subject to assessment locally by the County Assessor, or, in some instances, is subject to central assessment by the State Tax Commissioner. *See* Neb.Rev.Stat. §§77-1201 to 77-1236 (Reissue 1986 and Cum.Supp. 1988) (locally assessed personal property); Neb.Rev.Stat. §§77-601 to 77-675 (Reissue 1986 and Cum.Supp. 1988) (centrally assessed property of railroads and carline companies); Neb.Rev.Stat. §§77-801 to 77-803 (Reissue 1986 and Cum.Supp. 1988) (centrally assessed property of public service entities); Neb.Rev.Stat. §§77-1238 to 77-1242.02 (Reissue 1986 and Cum.Supp. 1988) (taxation of motor vehicles); Neb.Rev.Stat. §§77-1244 to 77-1250.02 (Reissue

1986) (taxation of air transportation carriers). The property of Trailer Train is subject to central assessment under the provisions for the taxation of carline companies contained in Neb.Rev.Stat. §§77-624 to 77-633 (Reissue 1986). For the year 1986, Trailer Train's rolling stock (which did not qualify for any statutory exemption) was taxed at 86.81% of its value, the equalization rate applied to all centrally assessed property subject to taxation in Nebraska.

For purposes of resolving the issue presented by Trailer Train's first cause of action, the parties stipulated to various dollar figures representing amounts of personal property subject to taxation in Nebraska as of January 1, 1986, as well as dollar values for various types of personal property exempted from taxation as of that date. It was stipulated that the total value of personal property subject to taxation in Nebraska as of January 1, 1986, was $8,150,172,920. Excluding values for rail transportation property, both real and personal ($778,112,028), real property of state assessed taxpayers ($838,357,000), and noncommercial and industrial motor vehicles ($2,485,468,139), it was agreed that the total value of commercial and industrial personal property subject to taxation was $4,048,238,753. The parties also agreed to total value figures for various types of property exempt from taxation under §77-202(6)-(9), as follows: crops in storage ($3,000,000,000); livestock ($2,707,737,500); farm machinery and equipment ($2,908,281,000); and business inventory ($4,029,800,000). On the basis of these figures, the parties stipulated that approximately 75% of the total value of commercial and industrial personal property (determined in relation to the definition of "commercial

and industrial property" contained in §306(3)(c) of the 4-R Act) was exempt from property taxation in Nebraska. (A2).

REASONS FOR GRANTING THE WRIT

I. THE EIGHTH CIRCUIT'S INTERPRETATION AND APPLICATION OF §306 IS CONTRARY TO THE EXPRESS TERMS OF THE STATUTORY SCHEME ESTABLISHED BY CONGRESS.

In affirming the judgment of the District Court that the taxation of Trailer Train's property pursuant to Neb.Rev.Stat. §§77-624 to 77-633 (Reissue 1986) violated §306(1)(d), the Court of Appeals relied principally on two prior Eighth Circuit decisions interpreting the scope of §306(1)(d), *Ogilvie v. State Board of Equalization*, 492 F.Supp. 446 (D.N.D. 1980), *aff'd* 657 F.2d 204 (8th Cir.), *cert. denied* 454 U.S. 1086 (1981) ["*Ogilvie*"] and *Burlington Northern R.R. Co. v. Bair*, 584 F.Supp. 1229 (S.D. Iowa 1984), *aff'd* 766 F.2d 1222 (8th Cir. 1985) ["*Bair*"]. In *Ogilvie*, the court held that the value of personal property and trade fixtures could not be included in the assessment of railroad property in North Dakota when the personal property of all locally assessed businesses was exempt from *ad valorem* taxation. The court based its conclusion that the "any other tax" provision in §306(1)(d) encompassed both *ad valorem* property taxes and tax exemptions on its review of the legislative history of §306, stating broadly that the purpose of this section " . . . was to prevent tax discrimination against railroads in any form whatsoever." 657 F.2d at 210. Subsequently,

in *Bair*, the court determined that an Iowa plan of rollbacks and credits against personal property taxes which had the effect of exempting ninety-five percent of personal property owners from taxation violated §306(1)(d) when railroad personal property was specifically excluded from the benefits of the rollbacks and credits. Again, the court reiterated its interpretation that §306(1)(d) covers "classification" or exemption discrimination with regard to all claims of discriminatory taxation of railroads, calling §306(1)(d) ". . . a broad provision intended to reach all types of discriminatory tax treatment." 766 F.2d at 1224. The Court of Appeals in the instant case determined that, as certain kinds of personal property not owned by Trailer Train (consisting primarily of business inventory, agricultural machinery and equipment, crops, and livestock) are exempt from taxation in Nebraska, the tax imposed on Trailer Train's rail cars pursuant to Neb.Rev.Stat. §§77-624 to 77-633 (Reissue 1986) violated the "any other tax" provision in §306(1)(d) under the interpretation of this provision previously articulated by the Eighth Circuit in *Ogilvie* and *Bair*. (A26).

While the Eleventh Circuit Court of Appeals has concurred in the Eighth Circuit's interpretation that §306(1) (d) may encompass a claim of discriminatory tax treatment by virtue of the provision of property tax exemptions, *Department of Revenue v. Trailer Train Co.*, 830 F.2d 1567, 1573 (11th Cir. 1987), a contrary view was expressed by a California federal district court in *Trailer Train Co. v. State Board of Equalization*, 538 F.Supp. 509, 512-13 (N.D. Cal. 1982). Both of these cases involved claims of prohibited discriminatory taxation under

§306(1)(d) based on statutory provisions exempting from taxation a specific type of personal property (business inventory), presenting situations virtually identical to that existing under the Nebraska statutory provisions exempting certain types of personal property, including business inventory, agricultural machinery and equipment, crops, and livestock. Exemptions for specific types of personal property are not uncommon, and many states have, either by Constitution or statute, provided total or partial exemptions for certain types of personal property as part of their overall scheme of taxation.[1] Thus, the

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[1] A number of states have, like Nebraska, exempted various types of agriculturally-related personal property from taxation. *E.g.*, Idaho Code §63-105(R) and -105(Y) (Cum.Supp. 1988) (crops; livestock); Kan. Stat. Ann. §79-201(j) and (n) (Cum.Supp. 1988) (farm machinery and equipment; grain); Md. Tax-Property Code Ann. §§7-219, -223, and -224 (1986 and Cum.Supp. 1988) (agricultural products; farm implements; livestock); Mich. Comp. Laws Ann. §211.9(j) and (n) (West 1986) (personal property used in agricultural operations; farm products); Miss. Code Ann. §27-31-1(i), -(k), -(m) to -(p) (Cum.Supp. 1988) (farm products; livestock; farm tools and machinery); Mont. Code Ann. §15-6-207 (1987) (agricultural products); N. C. Gen. Stat. §105-275(37) (Cum.Supp. 1988) (poultry, livestock and feed); Or. Rev. Stat. §§307.325 and -.340 (1987) (agricultural products; farm machinery and equipment; farm inventories); S. C. Code Ann. §12-37-220B(13)(15) (Cum.Supp. 1988) (agricultural products; farm machinery and equipment; livestock and poultry); Tex. Tax Code Ann. §§11.16 and 11.161 (Vernon 1982) (farm products and implements); Utah Code Ann. §§59-2-1101 and 59-2-1112 (Supp. 1988) (farm machinery and equipment; livestock); Wash. Rev. Code Ann. §§84.36.140, -.150, .160 and 84.36.473, -.477 (West Supp. 1989) (grain; agricultural products; livestock); Wis. Stat. Ann. §70.111(2), (4), (9), and (17) (West 1989) (farm animals; crops;

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interpretation and application of §306(1)(d) in this manner may impact a number of states other than Nebraska, necessitating review by this Court to resolve the conflicting interpretations as to the scope of this subsection of §306 in situations involving exempt property.

Additionally, petitioner believes the Court should grant the writ of certiorari to review the opinion of the Court of Appeals on the ground that the interpretation and application of §306 adopted therein is contrary to the express terms of the statutory scheme enacted by Congress. In *Burlington Northern R.R. Co. v. Oklahoma Tax Commission*, 481 U.S. 454 (1987), this Court, in considering whether a claim of alleged overvaluation of railroad property could be considered in an action brought under §306, indicated the purpose and intent of this provision should be interpreted in light of the plain language of the statute. The Eighth Circuit's consideration of claims of discriminatory property taxation under §306(1)(d) is inconsistent with the plain language of §306. In addition, the court's consideration of exempt property in determining a claim of discriminatory taxation under §306 is also at odds with the express language of the statute. Furthermore, the court's failure to adopt and apply the common and ordinary meaning of discrimination in construing §306(1)(d) results in an unreasonable and impermissible expansion of §306 beyond its plain terms. Thus, in light of this Court's recent indication that §306 should be interpreted and applied by reference to the plain meaning of

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farm machinery; livestock). In addition, thirty-three states (including Nebraska) currently provide either a total or partial property tax exemption for business inventories. 2 State Tax Guide (CCH) ¶ 20-150 (1989).

the language employed by Congress, the Court should grant the writ to correct the Eighth Circuit's erroneous interpretation and application of §306(1)(d), and to definitively set forth the proper scope of this portion of §306 to provide clear guidance in this area of state and local taxation.

A. As a Matter of Statutory Interpretation, §306(1)(d) on its Face Applies Only to Any Tax Other Than a Property Tax.

As this Court noted in its decision in *Burlington Northern R.R. Co. v. Oklahoma Tax Commission*, the 4-R Act was enacted in 1986 after 15 years of "intermittent and inconclusive legislative action." 481 U.S. at 457. The overriding purpose of the Act was ". . . to provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railroad system of the United States." *Id.* The Court stated that, among the means chosen by Congress to achieve these objectives was the enactment of §306 of the Act, relating to the prohibition of discriminatory state taxation of railroads. *Id.* Construing the provisions of §306 in the context of determining whether a claim of alleged overvaluation of railroad property could be considered under §306, the Court indicated the meaning of §306 should be interpreted by reference to the plain language of the statutory scheme enacted by Congress. *Id.* at 461.

An examination of §306 in its entirety reveals that subsection (1)(d) is the last in a series of provisions adopted by Congress in the exercise of its power to prohibit undue discrimination in the taxation of rail carriers under the Commerce Clause. Subsection (l)(a) of

§306 makes it unlawful for a state or local taxing district to assess a tax on "transportation *property* which bears a higher ratio to [its] true market value . . . than the ratio which the assessed value of all other commercial and industrial property" in the taxing jurisdiction bears to its true market value. (Emphasis added). Section 306(1)(b), in turn, makes unlawful the levy or collection of a tax on property assessed in violation of §306(1)(a). Section 306(1)(c) makes unlawful the levy or collection of "any ad valorem *property* tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction." (Emphasis added). Finally, §306(1)(d) prohibits "[t]he imposition of any *other* tax which results in discriminatory treatment of a common carrier by railroad. . . ." (Emphasis added).

Construing §306 in its entirety, it is evident that, on its face, the reference in subsection (1) (d) to any "other" tax clearly refers to a tax other than a property tax, as subsections (1)(a), (b), and (c) specifically apply only to the *ad valorem* property tax treatment of rail transportation property. Consistent with this view as to the intent of Congress in enacting this portion of §306, several courts have construed the prohibition in §306(1)(d) against the imposition of "any other tax" which results in discrimination against railroads to reach various types of non-property taxes. *See, e.g, Kansas City Southern Ry. Co. v. McNamara,* 817 F.2d 368 (5th Cir. 1987) (Louisiana Transportation and Communications Tax); *Richmond, Fredericksburg & Potomac R.R. Co. v. Department of Taxation,* 762 F.2d 375 (4th Cir. 1985) (Virginia Corporate Net Income Tax); *Alabama Great Southern R.R. Co. v. Eagerton,*

663 F.2d 1036 (11th Cir. 1981) (Alabama Franchise Tax); *Chesapeake & Ohio Ry. Co. v. Rose*, 651 F.Supp. 1463 (S.D.W. Va. 1985) (West Virginia Carrier Income Tax); *Atchison, Topeka & Santa Fe Ry. Co. v. Bair*, 338 N.W.2d 338 (Iowa), *cert. denied*, 461 U.S. 1071 (1983) (Iowa Fuel Excise Tax).

Petitioner has no quarrel with the conclusions reached in these cases that §306(1)(d) reaches claims of discriminatory tax treatment of railroad common carriers in situations involving nonproperty taxes. Indeed, this is precisely the type of discrimination that this subsection was intended to remedy, as evidenced by the express terms of §306. In following the prior Eighth Circuit decisions in *Ogilvie* and *Bair*, the Court of Appeals simply followed its previous erroneous interpretation of §306(1)(d) in this instance by finding that the tax imposed on the property of Trailer Train under Neb.Rev.Stat. §§77-624 to 77-633 (Reissue 1986) violated this statutory provision. While this construction of §306(1)(d) by the Court of Appeals in this case may be characterized as consistent with its prior interpretation of this provision, it is contrary to the express terms of §306. Persistence simply cannot be equated with correctness. In view of this Court's clear statement in *Burlington Northern R.R. Co. v. Oklahoma Tax Commission* that §306 should be construed in light of the plain language of the statute, the Court should grant the writ of certiorari sought in this case to set forth the proper interpretation of §306(1)(d) as applying only to taxes other than property taxes.

B. The Plain Language of Section 306 Mandates that Exempt Property Be Excluded From Consideration in Evaluating a Claim of Discriminatory Taxation.

Assuming, *arguendo*, that the Court of Appeals was correct in considering Trailer Train's claim of discriminatory property taxation under §306(1)(d), it is nevertheless apparent that, based on the plain language of §306(3)(c), the court erroneously considered commercial and industrial property exempt from taxation in finding a violation of the statute.

In determining whether §306 has been violated by the imposition of a discriminatory tax on rail transportation property, Congress has established that the relevant inquiry requires a comparison between the taxation of rail transportation property and the taxation of the general class of "commercial and industrial property," as defined by the Act. The term "commercial and industrial property" is defined in §306(3)(c) as follows:

> "commercial and industrial property" or "all other commercial and industrial property" means all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use *and which is subject to a property tax levy;*. . . . (Emphasis added).

Congress has excluded five separate types of property through this definition: (1) rail transportation property; (2) land used primarily for agricultural purposes; (3) land used primarily for timber growing; (4) property *not* devoted to commercial or industrial use; and (5) property which is *not* subject to a tax levy. The types of property

exempted under Neb.Rev.Stat. §77-202(6) – (9) (Cum. Supp. 1988), which provide the basis for the figure indicating that 75% of the value of commercial and industrial personal property in Nebraska was exempt in 1986, are specifically excluded from the definition of commercial and industrial property to be considered for purposes of determining discriminatory property tax claims under §306. Accordingly, the Eighth Circuit should have rejected Trailer Train's claim under §306(1)(d), as the appropriate comparison under §306, construed in its entirety, precludes consideration of exempt property in assessing a claim of discriminatory property taxation.

Various courts have concluded that property which is wholly exempt from taxation is not "subject to a tax levy" and, therefore, is not "commercial and industrial property" within the meaning of §306. In *Atchison, Topeka & Santa Fe Ry. Co. v. State of Arizona*, 559 F.Supp. 1237 (D. Ariz. 1983), the railroads argued that tax-exempt commercial property should be considered as "commercial and industrial property" for purposes of determining discrimination under the 4-R Act. In rejecting this argument, the court stated:

> The 4-R Act defines "commercial and industrial property" in part as property "subject to a property tax levy." 49 U.S.C. § 11503(a)(4). Under the Arizona Constitution, manufacturer's inventories, a form of personal commercial property that otherwise would be included in class three, is exempt from taxation. Ariz.Const., Art. IX, § 13. The plaintiffs contend that this property should be considered as commercial and industrial property because, as they interpret the language of § 11503(a)(4), manufacturers' inventories are "subject to a property tax levy" in the sense that it *could* be taxed if the people of Arizona chose to

> amend their constitution. But this interpretation is simply unreasonable. *Property "subject to" a tax levy is property which is presently taxed. Property which is for any reason tax-exempt is excluded as a form of commercial and industrial property. ACF Industries, Inc. v. State of Arizona, supra.* See also *Ogilvie v. State Board of Equalization, supra; Trailer Train Co. v. State Board of Equalization,* 511 F.Supp. 553 (N.D.Ca.1981). Manufacturer's inventories, therefore, are not commercial and industrial property under the 4-R Act.

559 F.Supp. at 1245 (Emphasis added).

Similarly, in *ACF Industries, Inc. v. State of Arizona,* 561 F.Supp. 595 (D. Ariz. 1982), *aff'd* 714 F.2d 93 (9th Cir. 1983), the court declined to accept the carline companies' invitation to include tax-exempt business inventories within the class of "commercial and industrial property" for purposes of comparison under the 4-R Act. Finally, in *Clinchfield R.R. Co. v. Lynch,* 784 F.2d 545 (4th Cir. 1986), the Fourth Circuit considered the railroads' argument that tobacco inventories, which were partially taxed, should be included in calculating a claim of discriminatory property taxation under the 4-R Act. While concluding such partially-exempt property should be considered, the court indicated that wholly-exempt commercial and industrial property should be excluded for 4-R Act comparison purposes, stating:

> The court in ACF Industries was concerned only with totally exempt property, while the tobacco inventories in this case are taxed, but at a reduced rate. *The 4-R Act does not require a state to tax all business personal property; the state is free to grant any exemptions. What the Act does require, however, is that whatever property is taxed should be taxed at a rate that does not discriminate against railroad property.*

784 F.2d at 553. (Emphasis added).

The District Court, however, determined that, based on its view of the broad interpretation of §306(1)(d) adopted by the Eighth Circuit in *Ogilvie* and *Bair*, the definitional provision in §306(3)(c) was meant to apply only in situations involving claims of discriminatory assessment under §306(1)(a). (A15-16). Petitioner submits that this conclusion, accepted by the Court of Appeals, is contrary to the statutory scheme adopted by Congress under §306.

The purpose behind the enactment of §306 was to eliminate discrimination in state and local taxation of railroad common carriers. In order to accomplish this purpose, Congress established a statutory structure whereby the test of prohibited discriminatory property tax treatment is based on a comparison of the taxation of rail transportation property and the taxation of similar property, which it has identified and defined as "commercial and industrial property." Under the definition of "commercial and industrial property" set forth by Congress, it is clear that exempt property is not to be considered "commercial and industrial property" for purposes of determining whether a state has violated the anti-discrimination provisions established under the Act. As the court stated in *Clinchfield R.R. Co. v. Lynch*, there is nothing in the Act which requires " . . . a state to tax all business personal property; the state is free to grant any exemptions." 784 F.2d at 553.

Contrary to the Eighth Circuit's view, the exemptions provided for business inventory and agricultural machinery or products under Neb.Rev.Stat. §77-202(6)-(9) (Cum.Supp. 1988) do not discriminate against Trailer Train; indeed, the exemption of such types of property

cannot be characterized as discriminatory for the simple reason that they are available to any individual or entity in the State of Nebraska owning such property. Discrimination cannot be said to exist in situations where property is exempt irrespective of its ownership. The plain language of §306 reveals Congress intended that, in measuring whether the imposition of a tax on rail transportation property constituted discriminatory treatment in relation to the taxation of other property, legitimate and reasonable exemptions for certain types of property should not be construed to constitute prohibited discrimination simply because a railroad (or carline company) may not own a particular type of exempt property. Accordingly, the interpretation of §306(1)(d) as encompassing consideration of exempt property reflected in the Eighth Circuit decisions in *Ogilvie*, *Bair*, and the instant case, as well as the Eleventh Circuit decision in *Department of Revenue v. Trailer Train Co.*, 830 F.2d 1567 (11th Cir. 1987), should be rejected as contrary to the clear language of the statutory scheme established in §306.

In light of the erroneous interpretation of §306(1)(d) adopted by the Eighth and Eleventh Circuits, the Court should grant review and adopt the view articulated in *Trailer Train Co. v. State Board of Equalization*, 538 F.Supp. 509 (N.D. Cal. 1982), rejecting the notion that exemptions for specific types of property not owned by railroads are within the scope of §306. In that case, Trailer Train claimed it was discriminated against because of the existence of a California statute exempting business inventories from property taxation. It argued that the total value of all business inventory constituted a noticeable percentage of the total value of all commercial and industrial

property before it was exempted from property taxation. *Id.* at 511. Significantly, the definition of business inventory in California encompassed many of the same classes of personal property exempted in Nebraska, including goods intended for sale or lease in the ordinary course of business (*i.e.* business inventory), and raw materials including animals and crops held for sale or lease or used in the production of food or fiber and feed for such animals. *Id.* at 511n.2. Trailer Train initially raised its complaint in terms of §306(1) (a) of the 4-R Act, but also argued that the prohibition contained in §306(1)(d) should apply. The court denied Trailer Train's request for preliminary injunctive relief on both grounds, and held that "California's business inventory exemption does not violate the 4-R Act." *Id.* at 511.

The court noted the definition of commercial and industrial property found in the 4-R Act, §306(3)(c), and, in particular, the requirement that such property be subject to a property tax levy:

> The statutory definition of this term expressly requires that the property be "subject to a property tax levy" before it will be considered in the generic category. Clearly, if a type of property is "exempted" then it is not subject to such a levy and would not constitute any part of the aggregate property for comparison purposes.

Id. at 512.

The court continued as follows:

> In fact, however, that section excludes agricultural and timber producing land and it also expressly excludes all property which is not subjected to a property tax levy. The language of the statute is clear

> on its face and nothing in it indicates an intent to limit this final exclusion to charitable institutions.
>
> Assuming arguendo, section 306(3)(c) somehow could be construed to include tax-exempt property as commercial or industrial property, the plaintiffs' argument fails for a second reason. There is absolutely no indication that the creation of an exemption for business inventory discriminates against transportation property. . . . The state's treatment of business inventory does not reflect a differential treatment of taxpayers as to the assessment ratio or the applicable tax rate. At most this case represents a case where an exemption is made available for a class of property which the plaintiffs do not own.
>
> This is not a case, as the plaintiffs suggest, where the state is attempting to perpetuate "backdoor" discrimination against transportation property by simply exempting commercial property from taxation. On the contrary, California has an independently valid purpose behind the business inventory exemption. The creation of this exemption was intended to eliminate the previously available incentive for a taxpayer to warehouse his inventory outside California on the lien date. The resulting exemption is neutral in application and is not directed against any particular class of taxpayer.

Id.

The court went on to distinguish the Eighth Circuit's decision in *Ogilvie* as follows:

> The present case is distinguishable from *Ogilvie v. State Bd. of Equalization*, 657 F.2d 204 (8th Cir. 1981). There the court truly was comparing discrimination of the same type. The court held that the State Board could not include personal property and trade fixtures in the assessed value of railroad property where the same class of property was exempt for locally assessed businesses.

> In this case, the comparison is between apples and oranges. It is impossible to compare the effect of an exemption of a class of property that the plaintiffs do not own. The plaintiffs' argument would be equivalent to a person with no taxable income arguing that the existence of a charitable deduction favors the rich.

Id. at 512n.5.

While the above-quoted rationale was originally applied by the court to Trailer Train's §306(1)(a) claim, the court also adopted this reasoning in rejecting the §306(1)(d) claim as well:

> The plaintiffs also advance the argument that the present assessment and tax levy on their property violate the general prohibition against discriminatory tax treatment of common carriers contained in section 306(1)(d). This contention is erroneous for two reasons.
>
> First, as previously stated, the business inventory exemption does not discriminate against transportation property. Any discrimination, if it is present in this context, results from the disparate treatment of available tax exemptions as opposed to discrimination in the assessment ratio or tax rate.

Id. at 513.

In summary, the court concluded as follows:

> By enacting the 4-R Act, Congress intended to prevent discriminatory treatment of transportation property. When there is evidence of such discrimination, this court has acted to enforce this Congressional policy.
>
> By this action, however, the plaintiffs seeks to add a gloss to certain provisions of the 4-R Act which Congress did not see fit to include. In this case, the language of the various subdivisions are plain and an

> involved probe into the conundrum of "congressional intent" is unnecessary.

Id.

The situation described in the California *Trailer Train* case is identical to that existing in Nebraska, where specific exemptions are provided for types of property which railroads (and numerous other taxpayers) do not own. This is distinguishable from *Bair* and *Ogilvie*, where discrimination could be found where property of the same type or class as rail property was exempted, while rail property remained subject to tax. In Nebraska, as in California, the exemption of business inventories and agricultural machinery and products does not provide a valid basis for a finding of discrimination, as these types of property cannot truly be said to fall within the same type or class as railroad property or other property used as business equipment. Within this class, respondents rail property is treated no differently than is the property of any other of the large number of commercial and industrial taxpayers in Nebraska who are subject to tax on their income producing equipment. In light of the conflicting interpretations as to the scope of §306(1)(d) with regard to the consideration of such exemptions for specific types of property, the Court should issue the writ to definitively resolve these differing constructions of this provision.

C. Section 306(1)(d) Does Not Prohibit Reasonable Distinctions in the Classification of Property for Tax Purposes.

Finally, even if it may be concluded that claims of discriminatory property taxation or claims of "exemption

discrimination" in the area of property taxation may be considered under §306(1)(d), the Eighth Circuit nevertheless erred in failing to apply the plain and ordinary meaning of "discrimination" in determining the taxation of Trailer Train's rail cars violated this provision.

While the District Court and the Court of Appeals found prohibited discrimination through the application of a limited portion of the definition of "commercial and industrial property" in §306(3)(c) (absent any consideration of real property and including consideration of tax exempt property specifically excluded under this subsection), petitioner submits that nothing in §306(1)(d) either requires or permits a mathematical comparison of this nature for purposes of establishing discrimination under this particular provision. Rather, §306(1)(d), by its plain terms, requires a standard test of "discrimination" based on the common meaning of this term, without regard to the definition of commercial and industrial property specifically referred to in §306(1) (a)-(c). Indeed, if Congress had intended a contrary result, it would have been simple enough to make express reference to the class of "commercial and industrial property" in subsection (1)(d). The absence of any such reference indicates the meaning of the type of "discriminatory treatment" prohibited by this subsection must therefore be determined by resort to the common and ordinary meaning of such language. The appropriate standard to be employed in determining whether discriminatory treatment prohibited under §306(1)(d) is present in a given case should be that stated by the court in *Richmond, Fredericksburg & Potomac R.R. Co. v. Department of Taxation*, 762 F.2d 375, 380n.4 (4th Cir. 1985), in which the court noted that, in determining

whether the tax in question "discriminated against railroads, *qua* railroads," reliance on the common meaning of the term "discrimination" was appropriate:

> Both parties agree that "discrimination" must be given its "ordinary meaning": "[T]o make a distinction in favor of or against a person or thing on the basis of the group, class, or category to which the person or thing belongs, rather than according to actual merit." Random House Dictionary 410 (unabridged ed. 1976). In essence, discrimination is a "failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored." *Baker v. California Land Title Co.*, 349 F.Supp. 235, 238 (C.D.Cal.1972), *aff'd*, 507 F.2d 895 (9th Cir.1974), *cert. denied*, 422 U.S. 1046, 95 S.Ct. 2664, 45 L.Ed.2d 699 (1975).

The District Court, while noting its approval of the above quoted definition of discrimination (as quoted in the recent Eleventh Circuit decision in *Department of Revenue v. Trailer Train Co.*, 830 F.2d 1567, 1574 (11th Cir. 1987)), nevertheless did not address the issue of whether the exemptions for specific types of property under Neb.Rev.Stat. §77-202(6)-(9) (Cum.Supp. 1988) were rationally based and whether reasonable distinctions could be articulated to justify the exemption of these specific types of property in comparison to the broad class of business equipment (including rail cars) subject to full taxation in Nebraska. (All). The Eighth Circuit also failed to address this issue. Reasonable distinctions can be drawn, however, between the specific types of commercial and industrial property exempted under §77-202(6)-(9) (consisting of business inventory, agricultural machinery, and various agricultural products), and all equipment employed for use in the production of income, commonly referred

to as "business equipment," no part of which is exempt from property taxation in Nebraska.

Legitimate nondiscriminatory reasons exist which justify the distinction drawn between the types of commercial and industrial property exempt in Nebraska and the types of business property subject to taxation. For example, the court in *Trailer Train Co. v. State Board of Equalization*, 538 F.Supp. 509, 512 (N.D. Cal. 1982) recognized that California had "an independently valid purpose behind the business inventory exemption," which was "intended to eliminate the previously available incentive for a taxpayer to warehouse his inventory outside California on the lien date." Furthermore, the unique nature of agri-business, coupled with a recognition of the high-risk character and high outlay, low income nature of such business, has been recognized as a valid basis for distinguishing between agricultural property and other types of property for tax purposes. *See* Comment, *Nebraska's "Mysterious" New Tax Valuation System: LB 271, the Agricultural Land Valuation Law*, 19 Creighton L.Rev. 623, 628 (1986).

Indeed, the fundamentally different nature of the types of property exempt under §77-202(6)-(9) (business inventory, agricultural machinery, and agricultural products) in comparison to all other items of property in the class of business equipment (including rail cars) demonstrates that any comparison of the tax treatment of such exempt property does not provide a reasonable and valid basis for comparison. The relationship between the types of property exempted and rail transportation property can hardly be viewed as either antagonistic or competitive for purposes of determining whether any disparate

treatment between such property works to the disadvantage of rail transportation property. Apart from the fact that the definition of "commercial and industrial property" in §306(3)(c) specifically excludes exempt property from consideration in evaluating 4-R Act claims of discrimination, it is evident that, in comparison to the relevant class in this instance involving all non-agricultural business equipment (which is subject to taxation irrespective of the nature or ownership of the property), the rail cars owned and operated by Trailer Train in Nebraska are subject to equal tax treatment.

The bulk of exempt personal property in Nebraska is comprised of business inventory and agricultural products such as crops and livestock, which are the equivalent of farm inventories. Inventories are commonly exempted from *ad valorem* taxation. A manufacturing or commercial enterprise is typically comprised of both realty and personalty (equipment), all of which is subject to *ad valorem* tax in Nebraska. While inventories have been exempted from property tax in Nebraska, such property will be subject to Nebraska sales or use tax when it comes to rest with the ultimate consumer. *See* Neb.Rev.Stat. §§77-2701 to 77-2713 (Reissue 1986). To subject inventory to both an *ad valorem* tax on lien date and a sales or use tax when sold or consumed places a heavy burden of taxation on such property. To recognize its transitory nature and reduce its tax burden accordingly represents a valid, reasonable distinction made by the Nebraska Legislature as to the tax treatment of inventories, as opposed to business equipment, which is of a fixed character and is generally used over and over in the production of income.

Indeed, the reasonableness of the exemptions granted by statute in Nebraska for business inventories, property used in agricultural production, and the products thereof, was recognized by the Nebraska Supreme Court in *Stahmer v. State*, 192 Neb. 63, 218 N.W.2d 843 (1974), in which the court upheld the constitutionality of such exemptions, stating: "There can well be public policy reasons for the grant of these exemptions. It is generally recognized that persons engaged in agricultural pursuits and in businesses with large inventories are, in proposition to ability to pay, heavily taxed." The Eighth Circuit should have applied the common and ordinary meaning of "discrimination" in the context of construing §306(1)(d) and determined that the differences in tax treatment between business equipment (including rail cars) and the property exempt under §77-202(6)-(9) are based on legitimate, reasonable distinctions and, therefore, do not result in "discriminatory treatment" within the intent and meaning of this provision.

CONCLUSION

The interpretation and application of §306(1)(d) by the Court of Appeals is contrary to the express terms and intent of the statutory scheme enacted by Congress. As a result of the erroneous and unreasonable expansion of §306 accomplished by virtue of the interpretation of subsection (l)(d) reflected in the decisions of both the Eighth and Eleventh Circuits cited herein, the provisions of §306 have been expanded beyond their intent and purpose to create a substantial and unwarranted intrusion into what historically has been an area of federal noninterference in

matters pertaining to state and local tax policy. The ability to fashion a comprehensive and fair tax structure designed to meet legitimate state policies and interests, including the provision of reasonable and rationally-based exemptions and classifications of property, is one of the most vital and important attributes of state sovereignty. Neither the language nor the history of §306 indicate that Congress ever intended this provision to permit the type of interference with legitimate state tax policy judgments accomplished as a result of the Eighth Circuit's decision. For any or all of the reasons discussed herein, a writ of certiorari should issue to review the opinion of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

TRAILER TRAIN COMPANY, RAILBOX COMPANY, AND RAILGON COMPANY,	) CV87-L-29
Plaintiffs,	) MEMORANDUM
vs.	) OPINION
DONALD S. LEUENBERGER, TAX COMMISSIONER OF THE STATE OF NEBRASKA,	) FOLLOWING ORAL ARGUMENTS
Defendant.	

(Filed Dec 11, 1987)

This memorandum sets forth the court's analysis of the only claim presented in the first part of this bifurcated trial. The plaintiffs, Trailer Train Co., and its wholly-owned subsidiaries, Railbox Co. and Railgon Co., (hereinafter referred to collectively as "Trailer Train") claim that the levy and collection of Nebraska's *ad valorem* tax on their tangible personal property violates section 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976 ("the 4-R Act"), Pub. L. 94-210, 90 Stat. 31, 54 (codified at 49 U.S.C. §11503) that prohibits taxes that discriminate against common carriers by rail. The plaintiffs and the defendant, Tax Commissioner Donald Leuenberger, have stipulated to the facts concerning this first claim and oral arguments were presented to the court on the unresolved legal issues.

Trailer Train furnishes rail cars to railroads, thereby enabling railroads to obtain and use standardized types of rolling stock without the individual burdens of ownership. Trailer Train has no property permanently located in

Nebraska; its only relationship to Nebraska stems from the fact that its rail cars are located or operated in the state by the railroads. All of the taxes disputed in this lawsuit were assessed after February of 1979, the effective date of the 4-R Act.

Simply put, the controversy is whether Nebraska's personal property taxation system, which provides for extensive exemptions from personal property tax under section 77-202, violates section 306(1)(d) of the 4-R Act. According to the parties' stipulation of facts, the section 77-202 exemptions exclude from taxation 75.75 percent of the commercial and industrial personal property in the state. The plaintiffs contend that the exemptions effectively nullify the nondiscriminatory character of Nebraska's facially neutral statute that requires all personal and real property that is not specifically exempted to be taxed. *See* Neb. Rev. Stat. §77-202. The plaintiffs claim that the exemptions violate section 306(1)(d) and the spirit of the 4-R Act. The defendants argue that Nebraska's taxation scheme is nondiscriminatory, and that, in any event, the group of property with which the plaintiffs want their property to be compared is restricted under section 306(3)(c) to that property that is "subject to a tax levy." The defendant contends that this restriction excludes the exempted property from the comparison group and therefore that all the taxpayers are treated fairly and equally.

The cornerstone of Nebraska's personal property taxation system is found in Neb. Rev. Stat. §77-201 (Reissue 1986) that provides that "all tangible personal and real property that is not expressly exempt, is subject to taxation and will be valued at its actual value." The valuation

of rail car lines, however, is guided by other statutes. In an attempt to value the car lines as going concerns, section 77-624 requires the president or chief officer of any car company to submit a statement to the tax commissioner that includes "(1) the aggregate number of miles made by each class of their cars on the several lines of railroad in this state during the preceding year ending December 31, (2) the aggregate number of miles made by each class of their cars on all railroad lines during the preceding year ending December 31, and (3) the total number of cars of each class owned by the company, individual, of firm." The information provided in that statement is used by the commissioner to ascertain and fix the valuation of each particular class of cars, as closely as possible to their actual values. The cars are then assessed based on that valuation. *See* Neb. Rev. Stat. § 77-626 (Reissue 1986).

The types of property that are exempt from the tangible personal property tax imposed under section 77-201 are listed in section 77-202 and include motor vehicles; most agricultural income-producing machinery; business inventories; feed, fertilizer, and farm inventory; and grain, seed, livestock, poultry, fish, honeybees and fur bearing animals. Trailer Train's rolling stock does not qualify for any statutory exemption. For the year 1986, Trailer Train's rolling stock will be taxed at 86.81 percent of its value – the equalization rate applied to all centrally assessed property subject to taxation in Nebraska for that year.

Section 306(1) of the 4-R Act states in part:

> " . . . It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:
>
> (a) The assessment (but only to the extent of any portion based on excessive value as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.
>
> * * *
>
> (d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part."

Pub. L. No. 94-210, 90 Stat. 54 (Feb. 5, 1976). Commercial and industrial property as used in section 306 means "all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy." *Id.* at 306(3)(c). Because the original language of section 306 was changed when it was codified, references will be to section 306 rather than to 49 U.S.C. § 11503. The parties have stipulated in the order on final pre-trial conference, filing 17, that the provisions of section 306 control.

Some of the legal issues that are important to the resolution of the plaintiffs' claim have been resolved

already by the Eighth Circuit Court. In *Trailer Train Co. v. State Board of Equalization*, 710 F.2d 468, 471-72 (8th Cir. 1983), the court held that the protections of section 306(1)(d) extend to private car lines as well as common carriers by rail. The language of section 306(1)(d) itself was instrumental in the court's reasoning. That section prohibits any tax that "results in discriminatory treatment of a common carrier by railroad." Recognizing the close historic and economic relationship of railroads to car lines, the court stated that any discriminatory tax on rail car lines will "result in discriminatory treatment" to common carriers by railroad. *Id.* Thus, a tax need not be directly imposed on the railroad in order to be prohibited by section 306(1)(d). This position has been adhered to in *Trailer Train Co. v. Bair*, 765 F.2d 744 (8th Cir. 1985) and adopted by the Eleventh Circuit in *Department of Revenue v. Trailer Train Co.*, No. 87-3093, slip op., 362, 369 (11th Cir. Nov. 2, 1987). *See also General American Transportation Corp. v. Louisiana Tax Commissioner*, 680 F.2d 400, 403 (1982) (finding that car lines should not be denied protection of the 4-R Act under section 306(1)(a)).

A case from the northern district of California, discussed in the defendant's brief, has held that private car lines are not entitled to protection under section 306(1)(d). The court reasoned that the "common carrier by railroad" language of the provision constitutes words of limitation under the traditional doctrines of statutory interpretation. Accordingly, the court held that rail car lines were explicitly excluded from the protection of section 306(d)(1). *Trailer Train Co. v. State Board of Equalization*, 538 F.Supp. 509 (N.D. Cal. 1982). Nevertheless, this court will follow the precedent of the Eighth Circuit in

recognizing that Trailer Train is entitled to the same protection afforded to railroads under section 306(1)(d).

The plaintiffs rely heavily on the Eighth Circuit cases of *Ogilvie v. State Board of Equalization*, 657 F.2d 204 (8th Cir. 1981), *cert. denied*, 454 U.S. 1086 (1981), and *Burlington Northern Railroad Co. v. Bair*, 584 F.Supp. 1229 (S.D. Iowa 1984) *aff'd* 766 F.2d 1222 (8th cir. 1985), in arguing that the Nebraska personal property tax scheme is discriminatory. Nebraska's tax commissioner relies primarily on statutory interpretation, the definition of commercial and industrial property in section 306(3)(c) and the reasoning of the foregoing case from the Northern District of California in arguing that the Nebraska scheme treats all taxpayers in the same way and, therefore, that the tax is not discriminatory under section 306(1)(d).

In *Ogilvie, supra*, the Eighth Circuit affirmed the district court's decision that section 306 prohibited North Dakota's assessment of a discriminatory tax against a railroad. The North Dakota system exempted from *ad valorem* taxation all the personal property of locally assessed businesses but subjected the personal property of centrally assessed businesses to an *ad valorem* tax on their personal property. North Dakota argued that its system was nondiscriminatory because the locally assessed businesses were subject to a business privilege tax in lieu of a personal property tax.

The Eighth Circuit court's consideration of the case began with a restatement of the goal of the 4-R Act: "to eliminate the long-standing burden on interstate commerce resulting from discriminatory State and local taxation of common and contract carrier transportation

property." *Ogilvie*, 657 F.2d at 206 quoting S. Rep. No. 1483, 90th Cong., 2d Sess., 1 (1968). The Court, quoting the district court opinion, stated that " '[t]he most obvious form of tax discrimination is to impose a tax on a class of rail transportation property that is not imposed on other nonrailroad property of the same class.' " *Id.* at 210. The court applied section 306(1)(d) to find that the distinction between locally assessed businesses and centrally assessed business imposed an unfair tax burden on the railroad. The Eighth Circuit, reiterating that section 306 was designed to "prevent tax discrimination against railroads in any form whatsoever," held that the North Dakota scheme was in violation of section 306. *Id.*

The plaintiffs also rely on *Burlington Northern Railroad Co. v. Bair, supra,* in which the railroad challenged Iowa's tax assessment rollback plan that, over time, completely excluded from personal property taxation certain items of and owners of personal property. Under the Iowa plan, the assessed value of most personal property was rolled back to 1973 values and the state granted tax credits against the property. The personal property owners who benefitted from the plan constituted 95 percent of all personal property owners in the state. The district court likened the credits to exemptions for the purpose of a section 306 analysis because the credits served to reduce the valuation figure to which the tax rate was applied. *Burlington Northern R. Co. v. Bair,* 584 F.Supp. 1229, 1232 (S.D. Iowa 1985). Those categories of property that were statutorily excluded from the tax rollback plan included any personal property owned by a public service company, any machinery used in manufacturing, computers and transmission towers and antennae.

The district court found that the rollback plan violated section 306(1)(d) because the majority of selected classes of property were not subject to the tax and the railroads were.

The Eighth Circuit affirmed the district court's decision and found that Iowa's classification scheme resulted in obvious discrimination against the railroad "by excluding it from the benefits of personal property tax rollbacks and credits which most other taxpayers enjoy." *Bair*, 766 F.2d at 1224. The court stated that "[t]his type of *de jure* discrimination clearly falls within the prohibition of section 306(1)(d)." *Id.* The court rejected the department of revenue director's argument that section 306(1)(d) applied only to taxes other than property taxes in stating:

> [S]ection 306(1) covers claims of unequal valuation ratios between railroad and other commercial and industrial property, but not classification discrimination as is presented here. Section 306(1)(d) is a broad provision intended to reach all types of discriminatory tax treatment. The fact that certain other taxpayers, besides railroads, also are denied the personal property rollbacks and credits does not mitigate the discrimination.

Id. at 1224. The Eighth Circuit narrowed the effect of its holding, however, in stating:

> Although we find Burlington Northern is entitled to the same banefits as most other taxpayers – rollback and credit – it is not entitled to total exemption. In applying section 306(1)(d), we find that if Burlington Northern's personal property is of such value that tax is still due after the rollback and credit, it must pay tax like any other substantial property owner. A difference in taxation based purely on wealth is not within the prohibition of section 306(1)(d).

Id. at 1224.

The Eighth Circuit in *Ogilvie* clearly established that the court had adopted a broad interpretation of section 306. The *Bair* court distinguished between the types of discrimination prohibited by the Act – discriminatory valuation ratios and discriminatory classifications – and found that section 306(1)(d) is available in cases in which section 306(1)(a) or 306(3)(c) seems to prevent a remedy. The scope of section 306(1)(d) was found to extend to classification discrimination according to the *Bair* court.

A general comparison of *Ogilvie, Bair* and the case at bar present reflect basic similarities. In *Ogilvie,* North Dakota imposed a discriminatory tax only on railroad personal property and not on any other class of personal property. In *Bair,* all the personal property owners in Iowa, with the exception of a minority of statutorily omitted owners including railroads, received the benefits of tax credits and tax rollbacks. Under the Nebraska scheme, the majority of the personal property in the state is statutorily exempted from taxation, while a minority of personal property, including all the property that belongs to Trailer Train in the state, is subject to an *ad valorem* tax on its actual value. I recognize that the mechanics of the tax schemes involved in these cases differ significantly. The systems in *Ogilvie* and *Bair* favored the majority of taxpayers, either by exempting them from taxation or taxing them at 1973 values, but expressly denied the railroads similar favorable treatment. In this case, the Nebraska system favors a majority of the property of possible taxpayers by exempting that property from taxation but denies the property of rail car lines the same favorable treatment. I find that the mechanical differences

between the systems are immaterial under the Eighth Circuit court's result oriented analysis of section 306(1)(d) claims.

The ultimate effect of the taxation scheme in each case, *Ogilvie, Bair* and the one commenced by Trailer Train in this court, is that the majority of possible taxpayers or the majority of the property benefitted from the taxation schemes, while a minority, including the railroads and car lines or their property, were burdened. The *Bair* case indicates that the discrimination caused by the Nebraska scheme is of the type that is prohibited by section 306(1)(d) because the result is to exclude Trailer Train from the benefits of personal property tax exemptions that most other taxpayers enjoy. *See Bair*, 766 F.2d at 1224. The issue presented in this first claim is not a question of unequal valuation ratios between the car lines and other commercial and industrial property, which would be properly brought under section 306(1)(a) and would invoke the definition of commercial and industrial property under section 306(3)(c). Rather, the issue is one of classification discrimination. *Id.*

While the *Ogilvie* and *Bair* cases are helpful to this court in characterizing the Eighth Circuit Court's approach to alleged violations of section 306, cases from other circuit courts have much to add to the analysis. The plaintiffs direct the court to the Eleventh Circuit Court's opinion in the *Department of Revenue v. Trailer Train Co.*, No. 87-3093, slip op. 362 (Nov. 2, 1987). In that case, Trailer Train argued that Florida's assessment of its property at 100 percent of its market value, while totally exempting all business inventory from taxation, violated

sections 306(1)(a) and 306(1)(d) of the 4-R Act. The Eleventh Circuit Court agreed with the district court's determination that Florida's failure to include the value of business inventory in the assessed value of "other commercial and industrial property" did not violate sections 306(1)(a) and 306(3)(c) because the business inventory was not "subject to a property tax levy" and thus was omitted from the definition of commercial and industrial property. *Id.* at 365. However, the court found that "§ 306(1)(d) requires consideration of tax exemptions in determining whether there has been discriminatory treatment." *Id.* at 369. Finding that the district court was in a more able position to determine whether a total business inventory exemption resulted in discriminatory tax treatment to the car line, the Eleventh Circuit remanded the case to the district court. In doing so, the court noted its agreement with the Fourth Circuit's conclusion:

> In essence, discrimination is a failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored.

Id. at 370, quoting *Richmond, Fredericksburg & Potomac R. Co. v. Department of Taxation*, 762 F.2d 375, 380 n.4, (4th Cir. 1985). I too, agree that this conclusion is prudent and that it can aid me in deciding section 306(1)(d) claims. Furthermore, the Eleventh Circuit recommended:

> In making such determination [as to whether an exemption resulted in discriminatory treatment], the court should consider whether it would be appropriate for it to consider the entire tax structure as applied against railroads and as applied against 'all other commercial and industrial businesses.'

Id. at 370, quoting *Alabama Great Southern Railroad Co. v. Eagerton*, 663 F.2d 1036, 1041 (11th Cir. 1981).

Trailer Train also relies upon *Kansas City Southern Ry. Co. v. McNamara*, 817 F.2d 368 (5th Cir. 1987), which involved a challenge to Louisiana's transportation and communications tax that only applied to public utilities as they were defined under Louisiana law. The court acknowledged that in enacting the 4-R Act, "Congress was most concerned with property tax discrimination, and it voiced that concern in detail in § 306(1)(a)-(c); but it included [§ 306(1)(d)] to ensure that states did not shift to new forms of tax discrimination outside the letter of the first three subsections." *Id.* at 373-74. Accordingly, the court found that section 306(1)(d) prohibited "all forms of tax discrimination against railroads by states." *Id.* at 374.

The Fifth Circuit determined that "[t]he only simple way to prevent tax discrimination against the railroad is to tie their tax fate to a large group of local taxpayers. A large group of local taxpayers will have the political and economic power to protect itself against an unfair distribution of the tax burden." *Id.* at 377. The court reasoned that a large, local group could rally the economic and political power that a small and foreign group would be unable to muster. Because the Fifth Circuit found that the railway's tax fate was tied to a small, foreign group, the court held that Louisiana's tax system discriminated against railroads in violation of section 306(1)(d).

The court recommended that the railway be "taxed only under taxes applicable to 'other commercial and industrial' taxpayers." Using the 'other commercial and industrial taxpayers' as the large, local group whose fate the railway would tie into was intended to thwart any

attempt by the state to "discriminate against the railroads by simply making sure that only a few powerless business taxpayers pay 'the same type of tax' as the railroad." *Id.* at 375, n.13. The Eighth Circuit has interpreted section 306 (1)(d) of the Act in a result-oriented fashion. Due to this interpretation, the protection from "any other" discriminatory tax has been extended by the Eighth Circuit to rail car lines under section 306(1)(d).

According to the Eleventh and Fifth Circuit court opinions, a broad interpretation of section 306(1)(d) is warranted. The Eleventh Circuit in *Department of Revenue, supra,* stated outright that exemptions should be considered in determining whether the state has levied a discriminatory tax on the railroad in violation of section 306(1)(d). Moreover, the Eleventh Circuit acknowledged that when a state favors one person to the disadvantage of another person, that state must demonstrate a reasonable distinction which justifies the differential treatment.

The tax commissioner's arguments are not persuasive. Leuenberger asserts that *Trailer Train v. State Board of Equalization,* 538 F.Supp. 509 (N.D. Cal. 1982) should control the disposition of this case. The plaintiff in that case challenged California's system of personal property taxation as discriminatory under sections 306(1)(a) and 306(1)(d) of the 4-R Act because a statute totally exempted business inventories from taxation. The federal district court in California determined that the exemption was not in violation of the Act. The court reasoned that section 306(3)(c)'s definition of commercial and industrial property, which limits commercial and industrial property, in part, to any property that is subject to a tax levy, demonstrates Congress' intention to exclude exempt

property from the total assessed value of taxable property. The court stated that "if a type of property is 'exempted' then it is not subject to such a levy and would not constitute any part of the aggregate property for comparison purposes." *Id.* at 512. Based on this analysis, the court found that the statutory exemption did not violate section 306(a)(1). However, the court's rejection of the plaintiff's section 306(1)(d) claim was based on two reasons: (1) any discrimination resulted from the "disparate treatment of available tax exemptions as opposed to discrimination in the assessment ratio or tax rate." *Id.* at 513 and (2) only "common carriers by rail" and not car lines could claim protection under section 306(1)(d) based on a literal reading of that section. Both reasons have been foreclosed in this circuit, where it has been said that car lines, as well as railroads, are protected by section 306(1)(d) and that classification discrimination is prohibited by that section. *Burlington Northern Railroad Co. v. Bair,* 766 F.2d 1222 (8th Cir. 1985).

The tax commissioner also relies upon *Atchison, Topeka & Santa Fe Ry. v. State of Arizona,* 559 F. Supp. 1237 (D. Ariz. 1983) and *Clinchfield R. Co. v. Lynch,* 784 F.2d 545 (4th Cir. 1986). The *Atchison, Topeka* plaintiffs challenged as discriminatory the state's valuation of their railroad property. The court relied upon the statutory definition of commercial and industrial property found in section 306(3)(c) to find that "property which is for any reason tax-exempt is excluded as a form of commercial and industrial property." *Atchison, Topeka,* 599 F. Supp. at 1245. Using that definition, the court decided that manufacturers' inventories were not commercial and industrial property under the Act and therefore their value did not

have to be calculated into the assessed value of all other commercial and industrial property. The *Clinchfield* court stated that a partial exemption of 40 percent of the value of stored tobacco inventories violated the 4-R Act. However, the Fourth Circuit court also added that "[t]he 4-R Act does not require a state to tax all business personal property; the state is free to grant any exemptions." *Clinchfield*, 784 F.2d at 553.

The cases from California, Arizona and Louisiana adopt an analysis of the 4-R Act that differs markedly from that espoused by the Eighth Circuit. The Eighth Circuit established in *Trailer Train v. State Board of Equalization*, 710 F.2d 783 (8th Cir. 1983) that the "result" language of section 306(1)(d) is key to the interpretation of that section. I believe that the stipulations of the parties establish that the result of Nebraska's taxation system is that the majority of personal property in the state is exempt while Trailer Train pays taxes on all of its personal property in the state. Therefore, the result appears to be discriminatory under section 306(1)(d).

The parties have stipulated that only 24.25 percent of all the tangible personal property in Nebraska is subject to personal property tax, and that Trailer Train's property falls into this minority. Simply because the group of property with which Trailer Train seeks to tie its tax fate is commercial and industrial property, there is no reason to adhere to the restrictions imposed by the definition in section 306(3)(c). The definitional provision was meant to be applied in disputes about the proper valuations for assessment purposes and should not be permitted to thwart the effectiveness of section 306(1)(d), which was intended to be a catch-all provision.

Specifically, I reject the defendant's argument that the definition of commercial and industrial property in section 306(3)(c) precludes a determination of discrimination under section 306(1)(d). The Eighth Circuit in *Ogilvie* made it plain that section 306(1)(d) should be given a broad interpretation to prevent discrimination in "any form whatsoever." The *Bair* decisions concluded that section 306(1)(d) is available in situations where a remedy is unavailable under section 306(1)(a) and that classification discrimination should be remedied through section 306(1)(d). Additionally, I have decided to adopt the Eleventh Circuit's decision to consider exemptions from taxes in determing whether railroads have been subject to discrimination in violation of section 306(1)(d).

Although the exemptions from tangible personal property taxation in Nebraska's scheme appear to result in discrimination, I must determine whether the actual result is an unfair and discriminatory tax burden on the railroads. Having determined that Trailer Train, as a rail car line, is entitled to the protection of section 306(1)(d), that the protections afforded to railroads and car lines under section 306(1)(d) are distinct from those provided by section 306(1)(a), and that the definition of commercial and industrial property found in section 306(3)(c) concerns challenges to tax assessment ratios under section 306(a)(1) and has no significance to a claim based on classification discrimination under 306(1)(d), I must find that Trailer Train is entitled to the protection from unfair classifications that result in discriminatory tax treatment under section 306(1)(d). I conclude that Nebraska's system discriminates against Trailer Train in violation of section 306(1)(d) of the 4-R Act based on the fact that

75.75 percent of the personal property in the state is exempt and none of Trailer Train's personal property is exempt.

A comparison of the effect of the tax and exemptions on the plaintiffs with the effect on all owners of commercial and industrial property in Nebraska reveals that the plaintiffs are taxed on all their commercial and industrial personal property at the rate of 86.81 percent of its actual value, whereas 75.75 percent of the commercial and industrial personal property in Nebraska is except [sic] from taxation. Others who own commercial and industrial personal property are obviously taxed substantially less on the same category of property. The tax is discriminatory.

Although the defendants seem to argue that the wording of Nebraska's personal property tax statutes is reasonably based on the type of property rather than the owner of the property, the conclusion that therefore there is no discrimination must be rejected. Taxing only property of a type owned only or almost entirely by railroads would not free the state from a charge of discrimination under section 306(1)(d) on the theory that as long as the statute described only property and not owners or operators there would be no discrimination against railroads. It is the effect on owners and operators as determined by the effect on property that makes the discrimination.

The tax commissioner argues vigorously that § 306(1)(d) was not created to give the plaintiffs a preferential tax treatment, which would be the result if the plaintiffs were given an injunction freeing them of the Nebraska tax. I agree that § 306(1)(d) is not for the purpose of giving anyone a preferential tax treatment,

but I agree with the analysis in that respect of *Kansas City Southern Railway Co. v. McNamara*, 817 F.2d 368 (5th Cir. 1987), in observing that courts are ill-equipped for the job of determining the specific tax level at which a particular taxpayer should be taxed. The *Kansas City Southern* case was more complex than this one, but I think the proper solution is, as in that case, to declare that the Nebraska tax violates the requirements of § 306(1)(d) and a collection of the tax from the plaintiffs must be unconditionally enjoined. I have confidence, as the court in *Kansas City Southern* had, in the ability of the state legislature and tax commissioner to "create tax structures that comply with the 4-R Act while ensuring that the railroads pay their fair share of state taxes." *Id.* at 378.

Dated December 11, 1987.

BY THE COURT

/s/ Warren K. Urbom
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

TRAILER TRAIN COMPANY, RAILBOX COMPANY, AND RAILGON COMPANY, Plaintiffs,	)	CV87-L-29
vs.	)	JUDGMENT
DONALD S. LEUENBERGER, TAX COMMISSIONER OF THE STATE OF NEBRASKA, Defendant.	)	

For the reasons stated in the accompanying memorandum of decision,

IT IS ORDERED that the assessment of the plaintiffs' personal property and the imposition, levy or collection of any personal property taxes against the plaintiff pursuant to Neb. Rev. Stat. §77-624 *et seq.* violates Section 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 54, now codified as 49 U.S.C. § 11503, and the imposition, levy, and collection of such taxes from the plaintiffs are permanently enjoined.

Dated December 11, 1987.

BY THE COURT

/s/ Warren K. Urbom
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-1118

TRAILER TRAIN COMPANY; RAILBOX COMPANY; and RAILGON COMPANY, Appellees, v. DONALD S. LEUENBERGER, TAX COMMISSIONER OF THE STATE OF NEBRASKA, Appellant.	Appeal from the United States District Court for the District of Nebraska

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Submitted: November 14, 1988

Filed: December 19, 1988

Before LAY, Chief Judge, JOHN R. GIBSON, Circuit Judge, and STUART,* Senior District Judge.

STUART, Senior District Judge.

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*The Honorable William C. Stuart, Senior United States District Judge for the Southern District of Iowa, sitting by designation.

The appellees, Trailer Train Company and its wholly owned subsidiaries Railbox Co. and Railgon Co., (hereinafter referred to as Trailer Train) brought this action against the Nebraska Tax Commissioner for declaratory and injunctive relief claiming that the levy and collection of Nebraska's ad valorem tax on their rail cars violate section 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. Law 94-210, 90 Stat. 31, 54 (codified at 49 U.S.C. § 11503) (the 4-R Act). The trial court[1] agreed and enjoined Nebraska from collecting that tax. The Tax Commissioner has appealed. The case was tried on stipulated facts.

Trailer Train stock is owned primarily by operating railroads. It furnishes rail cars to the railroads enabling them to use standardized types of rolling stock to improve economy and efficiency. Trailer Train has no property permanently located in Nebraska. Its only relationship to Nebraska stems from the fact that its rail cars are used in Nebraska and travel through the state. In this case there is no dispute over the actual value of the cars taxable under the statute. The allocation of value to Nebraska is based on a statutory formula. Neb. Rev. Stat. §§ 77-624 and 77-629.

Nebraska law provides for the taxation of all tangible personal property in the state at its actual value if it is "not expressly exempt therefrom." Neb. Rev. Stat. § 77-201. Exempt tangible personal property consists of motor vehicles paying registration fees; most agricultural

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[1] The Honorable Warren K. Urbom, United States District Judge, District of Nebraska.

income-producing machinery; business inventories; feed, fertilizer and farm inventory; and grain, seed, livestock, poultry, fish, honey bees and fur bearing animals. Neb. Rev. Stat. § 77-202. Rail cars are not exempt and in 1986 they would have been taxed at 86.81 per cent of their actual value, the equalization rate applied to all centrally assessed property for that year. 75.75% of commercial and industrial personal property is exempt from taxation in Nebraska. Except for the exempt personal property all other types of tangible personal property consisting of business equipment used in the production of income by individuals or corporations are subject to ad valorem taxation whether assessed locally by the County Assessor or centrally by the State Commissioner.

Section 306(1) of the 4-R Act provides, in substance, that no state, subdivision of a state, or any authority acting for a state or subdivision of a state: (a) may assess rail transportation property at a higher ratio of assessed value to true market value than the ratio at which all other commercial and industrial property is assessed; (b) levy or collect any property tax based on a discriminatory assessment; (c) tax rail transportation property at a rate exceeding that generally applicable to commercial and industrial property, and (d) to impose "any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part."[2] In this case we are only concerned with § 306(1)(d).

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[2] The language of 49 U.S.C. § 11503 codifying Section 306 differs from the language of Section 306 as enacted. The court relies on the language used in Section 306.

No issues are raised as to the applicability of Section 306 to Trailer Train. Appellant states the issues to be: (1) Whether the taxation of Trailer Trains personal property under Neb. Rev. Stat. §§ 77-624 to 77-633 (Reissue 1986) violates § 306(1)(d) of the 4-R Act; (2) Whether Trailer Train is entitled to relief under § 306(1)(d) in the form of a total exemption from taxation of their personal property.

Section 306(1)(d) violation.

The purpose of § 306 of the 4-R Act is to prevent tax discrimination against railroads in any form whatsoever. *Ogilvie v. State Board of Equalization*, 657 F.2d 204, 210 (8th Cir. 1981); *Trailer Train Co. v. Bair*, 765 F.2d 744, 745 (8th Cir. 1985). It does not encroach upon a state's right to tax its citizens as it sees fit, as long as that tax does not discriminate against railroads. *Clinchfield R. Co. v. Lynch*, 784 F.2d 545, 551-552 (4th Cir. 1986).

In determining that Nebraska's ad valorem tax did discriminate against Trailer Train, the trial court relied, principally, on *Ogilvie v. State Board of Equalization*, 657 F.2d 204 (8th Cir. 1981) *cert denied* 454 U.S. 1086 (1981) and *Burlington Northern Railroad Co. v. Bair*, 584 F.Supp. 1229 (S.D. Iowa 1984) *aff'd* 766 F.2d 1222 (8th Cir. 1985). Appellant argues that the Nebraska personal property taxation system, granting exemptions, distinguishes the instant case from these authorities.

Appellant points out that in *Ogilvie*, the North Dakota statute had, in essence, eliminated the personal property tax on locally assessed business property while retaining the personal property tax on centrally assessed taxpayers comprised of utilities and railroads. Appellant argues that the statute, on its face, deliberately and openly discriminates against rail transportation property

and that "under Nebraska's tax scheme, all commercial and industrial personal property in the nature of business equipment is subject to taxation, either through local assessment or by central assessment."

In the *Bair* case, Iowa had adopted a plan of rollbacks and credits against personal property taxes that would eventually eliminate such taxes on all personal property *taxed as personal property*. Section 427A.1 Iowa Code excluded from the benefits of the rollbacks and credits (1) centrally assessed properties including railroads and utilities; (2) machinery used in manufacturing; (3) computers; and (4) transmission towers and antennae. The *Bair* court determined that 50% of the value of railroad property, not taxed as personal property, was actually personal property and enjoined the state from excluding that 50% from the benefits derived from the rollback and exemption provisions of the Iowa Code.

Appellant attempts to distinguish this case from *Ogilvie* and *Bair* by stating:

> The Nebraska property tax scheme is neutral on its face and non-discriminatory, in that it does not deny to any individual or entity the ability to benefit from the exemptions provided for specific items of personal property. Rail transportation property such as that owned by Trailer Train is treated in the same manner as all other commercial or industrial property in Nebraska in the nature of business equipment. All items of personal property utilized by individuals or entities in the production of income are subject to taxation in Nebraska whether such property consists of desks, typewriters, computers, printing presses, or rail cars. The fact that the total value of such property may comprise approximately 25% of the total value of personal property available for taxation does not render the taxation of any portion of Trailer Train's property discriminatory.

Although the provisions of the taxing statutes involved in these three states differ, the results are the same. Section 306(1)(d) prohibits the imposition of any other tax that *results in discrimination* against railroads. *Trailer Train Co. v. State Board of Equalization*, 710 F.2d 468, 472 (8th Cir. 1983). Tax exemptions are to be considered in determining whether there has been discriminatory treatment under § 306(1)(d). *Department of Revenue v. Trailer Train*, 830 F.2d 1567, 1573 (11th Cir. 1987). It makes no difference whether the discriminatory result is achieved by exempting locally assessed property or exempting the property of particular business, the railroads are being discriminated against contrary to section 306(1)(d). The North Dakota and Iowa statutes gave tax benefits to certain taxpayers, those assessed locally. The Nebraska statute, instead, exempts certain kinds of personal property from taxation whether assessed locally or centrally. However, except for motor vehicles paying registration fees and business inventories, the exemptions apply only to agriculturally related personal property. Nebraska, through the use of exemptions has, in effect, given benefits to those taxpayers involved in agriculture which are denied to taxpayers involved in other business or industries. The exemptions are specific. Only taxpayers involved in agriculture are likely to own any of the exempted personal property. It is equally unlikely that those involved in agriculture would own any operating railcars. Thus, the result is that the exemptions apply to certain taxpayers, the same as the North Dakota and Iowa statutes.

The problem with a statute such as N.C.Gen. Stat. § 105-277(a) is not that it grants tax breaks for certain agricultural products. But the problem is that if states

> are allowed to grant tax reductions to an increasing number of property items without taking into account the effect on the taxation of railroad property, the antidiscriminatory spirit and intent of § 306 would soon be swallowed up in the exceptions.

Clinchfield R. Co. v. Lynch, 784 F.2d 545, 552 (4th Cir. 1986).

When the exemptions apply to three-fourths of the commercial and industrial property in Nebraska, and do not apply to rail cars, the tax system in Nebraska discriminates against Trailer Train and violates § 306(1)(d) of the 4-R Act.

The fact that other taxpayers are also subjected to the personal property tax does not render appellants actions against Trailer Train nondiscriminatory. Discrimination against a taxpayer protected by § 306(1)(d) cannot be justified because others are also victims of discrimination. *Burlington Northern R. Co. v. Bair*, 766 F.2d 1222, 1224 (8th Cir. 1985); *Ogilvie v. State Board of Equalization*, 492 F. Supp. 446, 455 (DND, 1980).

Total Exemption From Taxation

Appellant argues that "the district court erred in providing Trailer Train with preferential tax treatment to the extent of ordering the total exemption of their property from taxation as all other owners of business equipment are accorded no such exempt status under Nebraska law."

Appellant's reliance on *Burlington Northern R.R. Co. v. Bair*, 584 F. Supp. 1229 (S.D. Iowa 1984) is misplaced. In that case, the court rejected the railroad's argument that it should not pay any personal property taxes because the

fictitious median taxpayer paid none. The railroad was granted the same exemptions and credits the Iowa law gave to locally assessed taxpayers. In affirming the district court, the Eighth Circuit said:

> Although we find Burlington Northern is entitled to the same benefits as most other taxpayers – rollback and credit – it is not entitled to total exemption. In applying section 306(1)(d) we find that if Burlington Northern's personal property is of such value that tax is still due after the rollback and credit, it must pay tax like any other substantial property owner. A difference in taxation based purely on wealth is not within the prohibition of section 306(1)(d).

In *Bair* the other centrally assessed taxpayers were still subject to the personal property tax as are the taxpayers here who are not in agriculturally related businesses. The railroad in that case received the same "preferential tax treatment" that Trailer Train is accorded here. This is because the other taxpayers are not protected by § 306(1)(d). When three-fourths of the commercial and industrial personal property in the state is not taxed because personal property used in agriculturally-related business is exempt, railroads are discriminated against if their personal property is taxed. The appropriate remedy, as awarded by the trial court, is to enjoin the collection of the discriminating tax, even though other taxpayers do not receive the same benefits.

The judgment of the district court is affirmed.

A true copy.

APPENDIX C

Section 306 of the
Railroad Revitalization and Regulatory Reform Act
of 1976 Pub. L. No. 94-210, 90 Stat. 54 (Feb. 5, 1976)

(1) Notwithstanding the provisions of section 202(b), any action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:

(a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

(b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).

(c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.

(d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.

(2) Notwithstanding any provision of section 1341 of title 28, United States Code, or of the constitution or

laws of any State, the district courts of the United States shall have jurisdiction, without regard to amount in controversy or citizenship of the parties, to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of this section, except that –

(a) such jurisdiction shall not be exclusive of the jurisdiction which any Federal or State court may have in the absence of this subsection;

(b) the provisions of this section shall not become effective until 3 years after the date of enactment of this section;

(c) no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction;

(d) the burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State law; and

(e) in the event that the ratio of the assessed value of all other commercial and industrial property in the assessment jurisdiction to the true market value of all such other commercial and industrial property cannot be established through the random-sampling method known as a sales assessment ratio study (conducted in accordance with statistical principles applicable to such studies) to the satisfaction of the court hearing the complaint that transportation property has been or is being assessed or taxed in contravention of the provisions of this section, then the court shall hold unlawful an assessment of such transportation property at a ~~value~~ which bears a

higher ratio to the true market value of such transportation property than the assessed value of all other property in the assessment jurisdiction in which is included such taxing district and subject to a property tax levy bears to the true market value of all such other property, and the collection of any ad valorem property tax on such transportation property at a tax rate higher than the tax rate generally applicable to taxable property in the taxing district.

(3) As used in this section, the term –

(a) "assessment" means valuation for purposes of a property tax levied by any taxing district;

(b) "assessment jurisdiction" means a geographical area, such as a State or a county, city, township, or special purpose district within such State which is a unit for purposes of determining the assessed value of property for ad valorem taxation;

(c) "commercial and industrial property" or "all other commercial and industrial property" means all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy; and

(d) "transportation property" means transportation property, as defined in regulations of the Commission, which is owned or used by a common carrier by railroad subject to this part or which is owned by the National Railroad Passenger Corporation.

APPENDIX D

Neb. Const. art. VIII, § 1:

Sec. 1. Revenue; raised by taxation; classification; uniformity. The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct. Taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises, except that the Legislature may provide for a different method of taxing motor vehicles and may also establish a separate class of motor vehicles consisting of those owned and held for resale by motor vehicle dealers which shall be taxed in the manner and to the extent as provided by the Legislature and may also establish a separate class for trucks, trailers, semitrailers, truck-tractors, or combinations thereof, consisting of those owned by residents and nonresidents of this state, and operating in interstate commerce, and may provide reciprocal and proportionate taxation of such vehicles; *Provided*, that such tax proceeds from motor vehicles taxed in each county shall be allocated to the state, counties, townships, cities, villages, and school districts of such county in the same proportion that the levy of each bears to the total levy of said county on personal tangible property. The Legislature may enact laws to provide that the value of land actively devoted to agricultural or horticultural use shall, for property tax purposes, be that value which such land has for agricultural or horticultural use without regard to any value which such land might have for other purposes or uses, and prescribe standards and methods for the determination of the value of real or other tangible property at uniform and proportionate values. The Legislature may

provide that agricultural land and horticultural land used solely for agricultural or horticultural purposes shall constitute a separate and distinct class of property for purposes of taxation. Taxes uniform as to class of property or the ownership or use thereof may be levied by valuation or otherwise upon classes of intangible property as the Legislature may determine, and such intangible property held in trust or otherwise for the purpose of funding pension, profit-sharing, or other employee benefit plans as defined by the Legislature may be declared to be exempt from taxation. Taxes, other than property taxes, may be authorized by law. Existing revenue laws shall continue in effect until changed by the Legislature. The Legislature may provide that livestock shall constitute a separate and distinct class of property for purposes of taxation and may further provide for reciprocal and proportionate taxation of livestock located in this state for only part of a year. (Amended, 1952, 1954, 1960, 1964, 1972, 1978, 1984.)

Neb. Const., art. VIII, § 2:

Sec. 2. Exemption of property from taxation; classification. The property of the state and its governmental subdivisions shall be exempt from taxation. The Legislature by general law may exempt property owned by and used exclusively for agricultural and horticultural societies, and property owned and used exclusively for educational, religious, charitable, or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or user. Household goods and personal effects, as defined by law, may be exempted from taxation in whole or in part, as may be

provided by general law, and the Legislature may prescribe a formula for the determination of value of household goods and personal effects. The Legislature by general law may provide that the increased value of land by reason of shade or ornamental trees planted along the highway shall not be taken into account in the assessment of such land. The Legislature by general law and upon any terms, conditions, and restrictions it prescribes, may provide that the increased value of real property resulting from improvements designed primarily for energy conservation may be exempt from taxation. The value of a home substantially contributed by the Veterans' Administration of the United States for a paraplegic veteran or multiple amputee shall be exempt from taxation during the life of such veteran or until the death of his widow or her remarriage. The Legislature may exempt from an intangible property tax life insurance and life insurance annuity contracts and any payment connected therewith and any right to pension or retirement payments. The Legislature may classify personal property in such manner as it sees fit, and may exempt any of such classes, or may exempt all personal property from taxation. No property shall be exempt from taxation except as provided in the Constitution. The Legislature may by general law provide that a portion of the value of any residence actually occupied as a homestead by any classification of owners as determined by the Legislature shall be exempt from taxation. (Amended 1954, 1964, 1966, 1968, 1970, 1980.)

APPENDIX E

Neb. Rev. Stat. § 77-201 (Reissue 1986):

77-201. Property taxable; valued at actual value. Except as provided in sections 77-1239 and 77-1358 to 77-1368, all tangible property and real property in this state, not expressly exempt therefrom, shall be subject to taxation and shall be valued at its actual value. Such actual value shall be taken and considered as the taxable value on which the levy shall be made.

Neb. Rev. Stat. § 77-202 (Cum. Supp. 1988):

77-202. Property taxable; exemptions enumerated. (1) The following property shall be exempted from taxes:

(a) The property of the state and its governmental subdivisions;

(b) Property owned by and used exclusively for agricultural and horticultural societies;

(c) Property owned by educational, religious, charitable, or cemetery organizations and used exclusively for educational, religious, charitable, or cemetery purposes, when such property is not (i) owned or used for financial gain or profit to either the owner or user, (ii) used for the sale of alcoholic liquors for more than twenty hours per week, or (iii) owned or used by an organization which discriminates in membership or employment based on race, color, or national origin. For purposes of this subdivision, educational organization shall mean an institution operated exclusively for the purpose of offering regular courses with systematic instruction in academic, vocational, or technical subjects or a museum or historical

society operated exclusively for the benefit and education of the public, and charitable organization shall mean an organization operated exclusively for the purpose of the mental, social, or physical benefit of the public or an indefinite number of persons; and

(d) Household goods and personal effects when such property is not owned or used for financial gain or profit to either the owner or user.

(2) The increased value of land by reason of shade and ornamental trees planted along the highway shall not be taken into account in the assessment of such land.

(3) The premiums received by any insurance company authorized to do business in this state on all annuity contracts and pension, profit-sharing, and other employee benefit plans which are described in section 818(a) of the Internal Revenue Code of 1986, as amended, shall be exempt from taxes.

(4) Life insurance and life insurance annuity contracts and any payment connected therewith and any right to pension or retirement payments shall be exempt from the intangible tax.

(5) Vehicles registered under section 60-305.09 and paying the registration fees prescribed in such section shall be exempt from payment of ad valorem taxes.

(6) Agricultural income-producing machinery and equipment shall be exempt from the personal property tax except: (a) Motor vehicles, as defined in section 60-301; (b) property assessed by the Tax Commissioner as provided in sections 77-601 to 77-633; (c) property owned by parties deemed public service entities subject to the

provisions of sections 77-801 to 77-803; and (d) any building or fixture, whether permanently attached to the land or not.

(7) Business inventory shall be exempt from the personal property tax.

(8) Feed, fertilizer, and farm inventory shall be exempt from the personal property tax.

(9) Grain, seed, livestock, poultry, fish, honeybees, and fur-bearing animals shall be exempt from the personal property tax.

(10) Any personal property exempt pursuant to subsection (2) of section 77-4105 shall be exempt from the personal property tax.

Supreme Court, U.S.
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No. 88-1529

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN M. BOEHM, TAX COMMISSIONER
OF THE STATE OF NEBRASKA,
Petitioner,

VS.

TRAILER TRAIN COMPANY, RAILBOX COMPANY, AND
RAILGON COMPANY,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Respondents restate the Question Presented as follows:

Did the courts below correctly hold that the tax imposed on the property of car companies pursuant to Neb. Rev. Stat. §§77-624 to 77-633 (Reissue 1986) violates Section 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976 (49 U.S.C. §11503(b)(4)) when, under Nebraska law, 75% of commercial and industrial personal property (including business inventory, crops, livestock, and agricultural machinery and equipment) is exempt from property tax?

LIST OF PARTIES TO THIS PROCEEDING

The Petitioner is the Tax Commissioner of the State of Nebraska (referred to hereinafter as the "Commissioner").

Respondents are Trailer Train Company, Railbox Company and Railgon Company (referred to herein collectively as "Trailer Train"). Railbox and Railgon are wholly-owned subsidiaries of Trailer Train Company, a Delaware corporation whose shareholders are listed in Appendix A to this brief.

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STATUTES

Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 54 (1976) ("Section 306"), now codified at 49 U.S.C. §11503 ..... *passim*

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, which is not yet reported, is reprinted in Appendix B to the Petition. The opinion of the United States District Court for the District of Nebraska, dated December 11, 1987, and which is unreported, is reprinted in Appendix A to the Petition.

JURISDICTION

The jurisdictional grounds are adequately stated in the Petition.

STATUTORY PROVISION INVOLVED

This case involves Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 54 (1976) ("Section 306"), now codified at 49 U.S.C. §11503.

The language of 49 U.S.C. §11503 as codified differs from the language of Section 306. The codification cannot, however, be construed as making any substantive change to the meaning of Section 306. *See* Pub. L. No. 95-473, §3(2), 92 Stat. 1466 (1978). In the opinions of both courts below, the courts have referred to the language of Section 306 rather than to the language of the codification in resolving issues of statutory construction. Accordingly, Trailer Train will refer to the language of Section 306 in this response. Section 306 is reprinted in Appendix C to the Petition.

STATEMENT OF THE CASE

Trailer Train is satisfied with the Statement of the Case contained in the Petition.

REASONS FOR DENYING THE WRIT

The Petition does not present any grounds for granting certiorari as set forth in Rule 17 of the Rules of this Court. Trailer Train respectfully submits that the Petition should be denied.

1. No Special or Important Reasons Exist for Granting the Writ.

The Commissioner makes three arguments, all of which turn on statutory interpretation of Section 306, as to why this Court should accept this case and

reverse the ruling of the United States Court of Appeals for the Eighth Circuit. The three arguments, however, simply state the Commissioner's conviction that the Eighth Circuit's decision was incorrect. The Commissioner has been unable to point to any reason that this case presents an issue so special or so important to the public that it should be accepted by this Court, other than that the provisions of Section 306 as interpreted by the Eighth Circuit "create a substantial and unwarranted intrusion into what historically has been an area of federal noninterference in matters pertaining to state and local tax policy." Petition, pages 26-27.

This complaint of interference with state tax policy is exaggerated and irrelevant. Nothing in the record of this case even remotely suggests that the exemption of Trailer Train's railcars from personal property taxation somehow endangers Nebraska's policy of fostering certain other industries by use of personal property tax exemptions. The State of Nebraska remains free to structure its tax system in any form it chooses, so long as the taxes that it imposes on the railroad industry are not discriminatory within the meaning of Section 306.

In addition, "interference" with state tax policy is an irrelevant consideration in Section 306 cases. During the course of congressional deliberations leading to the passage of Section 306, Congress fully considered the effects that anti-discrimination legislation would have upon state finances. *See, e.g.*, S. Rep. No. 91-630, 91st Cong., 1st Sess. (1969). Congress concluded that national interests, e.g., revitalization of the nation's railroad system and elimination of economic burdens resulting from discriminatory state

taxation, must prevail over the parochial interests of the state in maintaining discriminatory tax systems. In enacting Section 306, Congress intended to eliminate state taxing schemes and practices that discriminated against the railroad industry. Congress gave the states three years within which to bring their statutes and practices into conformity with the act. See *Southern Railway Co. v. State Board of Equalization*, 715 F.2d 522, 523 n. 1 (11th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

Although the Commissioner in this case refers to "what has historically been an area of federal noninterference," the area of state tax discrimination against railroad transportation property is one in which Congress made a well-informed decision to interfere. As recognized by this Court in *Aloha Airlines v. Director of Taxation of Hawaii*, 464 U.S. 7, 14 n.10 (1983), disruption of state finances is an inevitable consequence of congressional regulation of state taxation. Since interference with state finances was plainly anticipated by Congress, such disruption cannot be used as the reason for narrowly construing the types of discrimination which can be found to be in violation of Section 306.

In *Burlington Northern Railroad Co. v. Oklahoma Tax Commission*, 481 U.S. 454 (1987), the respondents argued that Section 306 interfered with state tax policy, and that injunctive relief against state taxation offended the principle of comity. This Court stated:

> These are policy considerations which may have weighed heavily with legislators who considered the Act and its predecessors. It should go without saying that we are not free to reconsider them now.

Id. at 464. During the years of debate concerning Section 306 and its predecessors, Congress considered whether it should interfere with state tax policies. Congress finally determined that it must interfere, and that policy decision should govern this case now.

Ultimately, the Commissioner wishes this Court to review the finding of the district court below that Nebraska's exemption of 75% of its commercial and industrial personal property from ad valorem taxation, while continuing to tax all railroad transportation personal property, is a violation of Section 306. The Commissioner's insistence that this decision was incorrect is not a sufficient cause for this Court to review those findings.

2. No Conflict Exists among the Circuit Courts, or between the Decisions Below and Decisions of This Court, on the Issue of Whether Tax Exemptions can Result in Discriminatory Taxation.

Although the Commissioner does not expressly assert a conflict as a ground for this Court to accept this case, he does state the necessity of a "review by the Court to resolve the conflicting interpretations as to the scope of this subsection of Section 306 in situations involving exempt property." Petition, page 9. A close review of the Petition, however, shows that the only decision the Commissioner is able to cite as being "in conflict" with the decisions below is *Trailer Train Co. v. State Board of Equalization*, 538 F. Supp. 509 (N.D. Cal. 1982) ("*Trailer Train California*"). *Trailer Train California* is a district court opinion which, as far as Trailer Train has been able to ascertain, has never been followed on this proposition in any other federal court.

This is not the first time that *Trailer Train California* has been cited as creating a "conflict" which must be resolved by this Court. Following the decision of the Eighth Circuit in *Trailer Train Co. v. Bair*, 765 F.2d 744 (8th Cir.), *cert. denied*, 474 U.S. 1021 (1985), the Director of the Iowa Department of Revenue petitioned this Court for a Writ of Certiorari to the Eighth Circuit on virtually the same grounds that the Commissioner has stated in this case, including a citation of *Trailer Train California* as a conflict. This Court denied that petition. Nothing has changed since the denial of that petition to make review of this case any more necessary than was review of the *Bair* case.

Rule 17 of the Rules of this Court expressly requires a conflict among the circuit courts of the United States, not among the federal district courts. Every circuit court that has considered the issue has held correctly that exemptions of commercial and industrial property from ad valorem taxation must be taken into account in determining whether railroad property is being taxed discriminatorily under Section 306(1)(d). *See Department of Revenue v. Trailer Train Co.*, 830 F.2d 1567 (11th Cir. 1987); *Burlington Northern Railroad Co. v. Bair*, 584 F. Supp. 1229 (S.D. Iowa 1984), *aff'd in part, remanded in part*, 766 F.2d 1222 (8th Cir. 1985); *Ogilvie v. State Board of Equalization*, 492 F. Supp. 446 (D.N.D. 1980), *aff'd*, 657 F.2d 204 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981).

In addition, *Trailer Train California* is not even a final decision. *Trailer Train California* was decided upon an application for preliminary injunction and no interlocutory appeal has been taken. Therefore, the district court's conclusions in *Trailer Train Califor-*

nia are preliminary, subject to change by the district court at any time prior to the issuance of its final decision, and should not be relied upon as indicative of a "split" among the lower federal courts.[1] *See, e.g, Rittmiller v. Blex Oil, Inc.*, 624 F.2d 857, 863 n. 6 (8th Cir. 1980); *Berrigan v. Sigler*, 499 F.2d 514 (D.C. Cir. 1974). Obviously, the "conflict" to which the Commissioner refers does not exist.

The Commissioner also refers to "the conflicting interpretations as to the scope of Section 306(1)(d) with regard to the consideration of such exemptions," and requests that this Court should issue the writ to resolve "these differing constructions." Petition, page 21. The Commissioner can cite only the same *Trailer Train California* decision in support of this "conflict." His references to *ACF Industries, Inc. v. State of Arizona*, 561 F. Supp. 595 (D. Ariz. 1982), *aff'd*, 714 F.2d 93 (9th Cir. 1983), and *Clinchfield Railroad Co. v. Lynch*, 784 F.2d 545 (4th Cir. 1986), are irrelevant as both of those cases involved Section 306(1)(a), regarding differing assessment ratios, rather than Section 306(1)(d), forbidding any other tax that discriminates. Neither the Ninth Circuit nor the Fourth Circuit has ever held that wholesale property tax exemptions should be disregarded when determining whether discrimination exists in violation of Section 306(1)(d).

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[1] *Trailer Train California* was fully considered and rejected by the Eighth Circuit in *Trailer Train Co. v. State Board of Equalization*, 710 F.2d 468, 471 (8th Cir. 1983), notwithstanding the submission of an amicus brief by the State of California supporting the California court's interpretation.

CONCLUSION

Although Section 306 is important legislation, the issues raised in this case do not warrant review by this Court. The courts below applied this statute precisely as it is written and with the results intended by Congress. The petition does not present any ground for granting certiorari within the meaning of Rule 17 of the Rules of this Court and should be denied.

Respectfully submitted,

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APPENDIX A

SHAREHOLDERS IN TRAILER TRAIN COMPANY

ATCHISON, TOPEKA & SANTA FE RY. CO.
BOSTON AND MAINE CORPORATION
BURLINGTON NORTHERN R.R. CO.
CENTRAL OF GEORGIA R.R. CO.
CHICAGO AND NORTH WESTERN TRANSPORTATION CO.
CONSOLIDATED RAIL CORPORATION
CSX TRANSPORTATION, INC.
DENVER & RIO GRANDE WESTERN R.R. CO.
FLORIDA EAST COAST RY. CO.
GRAND TRUNK WESTERN R.R. CO.
ILLINOIS CENTRAL GULF R.R. CO.
KANSAS CITY SOUTHERN RY. CO.
MISSOURI-KANSAS-TEXAS R.R. CO.
MISSOURI PACIFIC R.R. CO.
NORFOLK & WESTERN RY. CO.
NORFOLK & WESTERN RY. CO., LESSEE OF WABASH R.R. CO.
RICHMOND, FREDERICKSBURG & POTOMAC R.R. CO.
ST. LOUIS SOUTHWESTERN RY. CO.
SOO LINE R.R. CO.
SOUTHERN PACIFIC TRANSPORTATION CO.
SOUTHERN RAILWAY CO.
UNION PACIFIC R.R. CO.